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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

KINSALE INSURANCE COMPANY, a  
Virginia corporation.

**Plaintiff.**

V.

FAIRWINDS ESTATE WINERY, LLC, a California limited liability company,

Defendant.

Case No. 3:21-cv-05968-WHO

**DEFENDANT'S NOTICE OF MOTION  
AND MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, STAY PROCEEDINGS:**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION**

Date: October 27, 2021  
Time: 2:00 p.m.  
Courtroom: 2  
Judge: Hon. William H. Orrick

Complaint Filed: August 2, 2021

SHARTSIS FRIESE LLP  
ONE MARITIME PLAZA  
EIGHTEENTH FLOOR  
SAN FRANCISCO, CA 94111-3598

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1           **DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS OR, IN THE**  
 2           **ALTERNATIVE, STAY PROCEEDINGS**

3           TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

4           NOTICE IS HEREBY GIVEN that on October 27, 2021, at 2:00 p.m. or as soon  
 5 thereafter as counsel may be heard by the above-entitled Court, located at 450 Golden Gate Ave.,  
 6 San Francisco, CA 94102, Defendant Fairwinds Estate Winery, LLC ("Fairwinds") will and  
 7 hereby does request the Court to issue an Order dismissing this action or, in the alternative,  
 8 staying all proceedings in this insurance coverage action pending resolution of a parallel  
 9 insurance coverage case involving all interested parties in the Napa County Superior Court (the  
 10 "State Action").

11           Fairwinds' Motion To Dismiss Or, In The Alternative, Stay Proceedings ("Motion") is  
 12 made on the ground that a dismissal or, in the alternative, stay is warranted under the Declaratory  
 13 Judgment Act ("DJA"), 28 U.S.C. § 2201 and the Court's broad discretion and relevant case  
 14 authorities thereunder, *e.g.*, *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942) ("Brillhart") and  
 15 *Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998) ("Dizol").

16           This Motion is based on this Notice of Motion and Motion, the Memorandum of Points  
 17 and Authorities, the Request for Judicial Notice, and Declaration of Felicia Draper, filed  
 18 concurrently herewith, on the other pleadings and papers filed herein, on such arguments of  
 19 counsel as may be permitted, and on such other matters as the Court may deem proper and  
 20 appropriate.

21           **ISSUES TO BE DECIDED**

22           Is a dismissal or, in the alternative, a stay of this action warranted under the Declaratory  
 23 Judgment Act? Namely, do the following factors, as set forth in *Brillhart* and *Dizol*, weigh  
 24 against this Court's exercise of its purely discretionary jurisdiction under the DJA and in favor of  
 25 "abstention" (dismissal or stay) of this DJA suit?

26           1.       Will dismissing or, in the alternative, staying this action avoid needless  
 27                   determination of state law issues; *i.e.*, is the State Action an ongoing "parallel  
 28                   proceeding," does this action present an unsettled issue of state law, and/or does

this Court have a strong interest in hearing this insurance coverage action now?

2. Will dismissing or, in the alternative, staying this action discourage forum shopping?
3. Will dismissing or, in the alternative, staying this action avoid duplicative litigation?
4. Will this action settle all aspects of the controversy?
5. Will this action clarify all of the legal relations at issue?
6. Was this action initiated for the purposes of procedural fencing?
7. Will this action result in entanglement between the federal and state courts?
8. Do other matters of convenience weigh in favor of a dismissal or, in the alternative, a stay?

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FAIRWINDS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, STAY PROCEEDINGS**

Defendant Fairwinds Estate Winery, LLC (“Fairwinds”) moves to dismiss this insurance coverage action filed by Plaintiff Kinsale Insurance Company (“Kinsale”) or, in the alternative, stay this action pending resolution of a parallel insurance coverage case in California state court.

## I. INTRODUCTION

This action, like the parallel State Action discussed *infra*, involves a property insurance claim arising from the devastating “Glass Fire” in 2020. The Glass Fire destroyed Fairwinds’ winery in Calistoga, Napa County, California. Fairwinds was insured for its losses by an underlying insurance policy issued by Beazley Insurance Services (“Beazley”) and an excess insurance policy issued by Kinsale. Beazley honored its obligation under its policy, and paid to Fairwinds the policy limit following Fairwinds’ presentation of its claim for damages caused by the fire. Kinsale did not honor its obligation under the excess insurance policy it issued to Fairwinds. Instead, after delaying its decision for nearly a year, Kinsale informed Fairwinds that it would not pay any amount under the excess policy it issued. Despite the fact that Fairwinds specifically purchased this excess coverage as “blanket” coverage in excess of its underlying policy with Beazley, Kinsale contends that the excess policy did not offer blanket coverage at all,

1 but rather coverage was limited to the amounts stated in a “Statement of Values.” After denying  
 2 coverage and receiving an express threat of legal action by its insured, Kinsale preemptively  
 3 “raced to the courthouse” and filed this declaratory relief action.

4 Fairwinds separately filed the State Action in Napa County Superior Court, seeking  
 5 contractual and extra-contractual damages from Kinsale and setting forth an alternative cause of  
 6 action against Fairwinds’ insurance brokers. Fairwinds respectfully requests that this Court  
 7 decline to exercise its purely discretionary jurisdiction under the DJA and dismiss this action or,  
 8 in the alternative, stay this action pending resolution of the State Action. *Each* of the *Brillhart*  
 9 and *Dizol* factors weighs strongly in favor of dismissal.

## 10 **II. FACTUAL BACKGROUND**

### 11 **A. State Action Allegations Regarding The Parties And The Policies**

12 Fairwinds owns and (until it suffered the devastating consequences of the Glass Fire in  
 13 September 2020) operated, a winery in Calistoga, Napa County, California (the “Winery”). *See*  
 14 Declaration of Felicia Draper (“Draper Decl.”), filed herewith, Ex. A (the State Action  
 15 Complaint) at ¶¶ 22-23. Fairwinds’ Winery is comprised of, among other things: a main building  
 16 that contains a tank and barrel storage room, bottling line, offices, and other facilities (the “Main  
 17 Building”); a building that contains fermentation and storage tanks (the “Tank Building”); an  
 18 underground cave system for barrel storage and hospitality activities (the “Caves”); and a tasting  
 19 room (the “Tasting Room”). *Id.*, ¶ 22.

20 On or about September 27, 2020, the Glass Fire ignited in the vicinity of Napa and  
 21 Sonoma Counties, California. *Id.*, ¶ 23. Within days, the Glass Fire had consumed a large portion  
 22 of the Winery, causing significant damage. *Id.* The Main Building and Tasting Room were total  
 23 losses. The Cave, Tank Building, landscaping, roadways, walkways, irrigation, equipment, and  
 24 other miscellaneous items suffered significant additional damage. *Id.*

25 Fairwinds was insured for these losses by two separate insurance policies. First,  
 26 Fairwinds was insured by a primary commercial property insurance policy issued by Beazley  
 27 (the “Underlying Policy”). Draper Decl., Ex. A at ¶ 24. Fairwinds obtained the Underlying  
 28 Policy through the services of Malloy, Imrie & Vasconi Insurance Services, LLC (the “Broker”),

1 an insurance broker in Napa County. *Id.*, ¶ 20, 24. The Underlying Policy offered coverage for  
 2 designated buildings, personal property, and equipment, up to a coverage limit of \$8,310,000 per  
 3 occurrence. *Id.*, ¶ 25.

4 The second of Fairwinds' policies was an excess property insurance policy issued by  
 5 Kinsale (the "Excess Policy"). *Id.*, ¶ 26. The Excess Policy is specifically in excess to the  
 6 Underlying Policy and provides additional coverage in excess of \$8,310,000, up to an additional  
 7 \$2,060,831 per occurrence. *Id.*, ¶ 27. Fairwinds also obtained the Excess Policy through the  
 8 services of the Broker, at the request of Fairwinds' lender. *Id.*, ¶ 28-30.

9 Fairwinds, through the Broker, promptly submitted a claim to Beazley on the Underlying  
 10 Policy for damages to covered property caused by the Glass Fire. Draper Decl., Ex. A at ¶ 31.  
 11 Beazley ultimately paid Fairwinds the Underlying Policy's policy limit of \$8,310,000. *Id.*, ¶ 32.

12 Fairwinds also submitted a timely claim to Kinsale on the Excess Policy, also through the  
 13 Broker. *Id.*, ¶ 33. More than nine months after the fire, Kinsale finally informed Fairwinds, on or  
 14 about July 7, 2021, that it was denying coverage. *Id.*, ¶ 34. Kinsale asserted that the Excess  
 15 Policy it provided, by reference to a Statement of Values, effectively created sub-limits for  
 16 coverage for individual categories of property. *Id.* Although Fairwinds clearly informed the  
 17 Broker of its lender's requirement of higher policy limits, and although Fairwinds believes the  
 18 Broker clearly expressed to Kinsale the goal of the increased limits—blanket coverage in excess  
 19 of \$10,000,000—Kinsale asserted otherwise. Notwithstanding its total failure to disclose that the  
 20 Excess Policy it sold issued was in its view so limited—to the point that the excess limits under  
 21 its interpretation were effectively illusory—Kinsale argued that the Statement of Values provides  
 22 independent sub-limits for the Main Building and Tasting Room; that Beazley paid an amount  
 23 above that total value (*i.e.*, the full \$8,310,000 coverage under the Underlying Policy); and that  
 24 the Excess Policy is not implicated and there is no coverage. *Id.* That same day, Fairwinds' COO  
 25 told Kinsale's claims examiner that Kinsale had been avoiding Fairwinds' inquiries for months  
 26 in an effort to delay "inevitable litigation" that would ensue. Draper Decl., Ex. B.

27 //

28 //

1           **B. The Litigation**

2           Just weeks after Fairwinds' COO shared his perception that litigation was "inevitable"  
 3 given Kinsale's denial of coverage, Kinsale went forum shopping, commencing this lawsuit  
 4 against its insured. Kinsale pleads three causes of action for declaratory relief, seeking  
 5 declarations to the effect that (1) Kinsale has no obligation to make any payment to Fairwinds  
 6 because the Excess Policy has not been implicated; (2) even if the Excess Policy is implicated,  
 7 Kinsale has no obligation to make any payment to Fairwinds because the damage suffered is not  
 8 scheduled on the Statement of Values; or (3) the loss was not covered under the Underlying  
 9 Policy.

10           Meanwhile, on September 9, 2021, Fairwinds<sup>1</sup> initiated a lawsuit in Napa County  
 11 Superior Court, alleging claims against Kinsale and also naming as defendants the Broker, CRC  
 12 Insurance Services, LLC, and CRC Commercial Solutions<sup>2</sup>—*Fairwinds Estate Winery, LLC, et*  
*al. v. Kinsale Ins. Co., et al.*, Case No. 21-cv-001288 (the "State Action"). *Id.*, Ex. A. The State  
 13 Action asserts breach of contract, breach of the covenant of good faith and fair dealing,  
 14 declaratory relief, unfair competition, concealment, and reformation claims against Kinsale, and  
 15 a claim for professional negligence against the Broker and the Producers. *Id.* In addition to  
 16 damages, Fairwinds seeks a declaration of its rights and obligations under the Excess Policy. *Id.*  
 17 All of these claims are based on the same factual circumstances as the instant lawsuit. *Id.*

18           **III. ARGUMENT**

19           **A. The Court Should Exercise Its Discretion Under The Declaratory Judgment**  
**Act To Dismiss This Action**

20           A dismissal of this action is appropriate in light of the discretionary nature of the DJA,  
 21 which gives a district court "unique and substantial discretion" to decline to exercise jurisdiction

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22           <sup>1</sup> In addition to Fairwinds Estate Winery, LLC, Fairwinds Estate, LLC is also a Plaintiff in the  
 23 State Action. *See Draper Decl.*, Ex. A. Fairwinds Estate Winery is the owner of the real property  
 24 on which the Winery conducts its business; Fairwinds Estate is the actual owner/operator of the  
 25 Winery. Fairwinds Estate Winery, LLC and Fairwinds Estate, LLC are affiliated in that they  
 26 share a common managing member, Fairwinds Holdings, LLC.

27           <sup>2</sup> The CRC entities (collectively, the "Producers") apparently were engaged by Broker and were  
 28 identified as "Producers" on the Underlying Policy and Excess Policy.

1 to issue a declaratory judgment.<sup>3</sup> *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). There is  
 2 no requirement that a district court exercise its jurisdiction, and whether to do so (or whether to  
 3 stay or dismiss a declaratory judgment action) is left to the sound discretion of the district court.  
 4 *Brillhart*, 316 U.S. at 494; *Huth v. Hartford Ins. Co.*, 298 F.3d 800, 803 (9th Cir. 2002). In doing  
 5 so, the court “must balance concerns of judicial administration, comity, and fairness to the  
 6 litigants.” *Travelers Indem. Co. v. Newlin*, 2020 U.S. Dist. LEXIS 167738, \*23 (S.D. Cal. Sep.  
 7 14, 2020) (quoting *Chamberlain v. Allstate Ins. Co.*, 931 F.2d 1361, 1367 (9th Cir. 1991)  
 8 (overruled in part on other grounds) ). In deciding whether to exercise jurisdiction under the  
 9 DJA, a district court should: 1) avoid needless determination of state law issues; 2) discourage  
 10 litigants from filing declaratory relief actions as a means of forum shopping; and 3) avoid  
 11 duplicative litigation. *Brillhart*, 316 U.S. 491. These *Brillhart* factors “remain the philosophic  
 12 touchstone” for such an analysis. *R.R. St. & Co. Inc. v. Transp. Ins. Co.*, 656 F.3d 966, 975 (9th  
 13 Cir. 2011). In addition to these “*Brillhart*” factors, courts also assess additional “*Dizol*”  
 14 considerations. Thus, where appropriate, district courts consider, among other factors:

15       whether the declaratory action will settle all aspects of the controversy; whether  
 16       the declaratory action will serve a useful purpose in clarifying the legal relations  
 17       at issue; whether the declaratory action is being sought merely for the purposes of  
 18       procedural fencing or to obtain a ‘res judicata’ advantage; [] whether the use of a  
 19       declaratory action will result in entanglement between the federal and state court  
 20       systems ... [and] the convenience of the parties, and the availability and relative  
 21       convenience of other remedies.

22       *Dizol*, 133 F.3d at 1225 n.5.

23       A party seeking a dismissal or stay need not demonstrate “exceptional circumstances,”  
 24       and federal courts regularly decline to hear declaratory judgment actions concerning insurance  
 25       coverage questions where, as here, the parties and issues overlap. *See, e.g., Huth*, 298 F.3d at  
 26       803-804. The *Brillhart* and *Dizol* factors strongly support a dismissal or, in the alternative, stay  
 27       of this declaratory relief action pending resolution of the State Action.

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28       <sup>3</sup> The DJA itself provides in relevant part: “any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought ....” 28 U.S.C. § 2201 (emphasis added).

1           **1. Dismissing this action will avoid needless determination of state law  
2           issues.**

3           Dismissing this action will satisfy the first *Brilhart* factor by avoiding a “needless  
4           determination of state law,” which may include an ongoing parallel state proceeding, an area of  
5           law Congress expressly reserved to the states, or a lawsuit with no compelling federal interest,  
6           such as a diversity action. *Continental Cas. Co. v. Robsac Indus.* (“*Robsac*”), 947 F.2d 1367,  
7           1371 (9th Cir. 1991) (overruled on other grounds by *Dizol*).

8           **a. The State Action is an ongoing “parallel” state proceeding.**

9           “If there are parallel state proceedings … there is a presumption that the entire suit should  
10          be heard in state court.” *Travelers Indem.*, 2020 U.S. Dist. LEXIS 167738, at \*25-26 (citing  
11          *Dizol*, 133 F.3d at 1225). A state proceeding is “parallel” to a federal declaratory relief action  
12          when: 1) the actions arise from the same factual circumstances; 2) there are overlapping factual  
13          questions in the actions; or 3) the same issues are addressed by both actions. *Golden Eagle Ins.  
14          Co. v. Travelers Cos.*, 103 F.3d 750, 755 (9th Cir. 1996) (overruled in part on other grounds by  
15          *Dizol*). “Parallel” actions are considered liberally, and underlying state actions need not involve  
16          the same parties or even the same issues to be considered “parallel;” it is enough that the state  
17          proceedings “arise from the same factual circumstances.” *Id.* at 754-55. The “parallel” action  
18          threshold is satisfied when the insurer seeks a coverage determination in the federal court, and  
19          the policyholder seeks an opposite coverage determination in the state court. E.g., *N. Pac.  
20          Seafoods, Inc. v. Nat'l Union Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 1714, at \*11-12 (W.D. Wash.  
21          Jan. 3, 2008); *State Farm Fire & Cas. Co. v. Meridian Indus. Corp.*, 1995 U.S. Dist. LEXIS  
22          16500, at \*10 (N.D. Cal. Oct. 31, 1995).

23           Here, the State Action is “parallel” in two respects. First, it seeks an opposite coverage  
24          determination from that which Kinsale seeks here, and both arise from the same set of factual  
25          circumstances. See *N. Pac. Seafoods*, 2008 U.S. Dist. LEXIS 1714, at \*11-12. Second, the State  
26          Action will adjudicate the consequences of the issues raised here: the nature and extent of  
27          damages that flow from Kinsale’s denial of coverage under the Excess Policy. Since the State  
28          Action will resolve Kinsale’s coverage responsibility, the State Action is clearly “parallel” and,

1 based on this factor alone, dismissal is warranted.

2                   **b. This suit potentially raises an unsettled issue of state law.**

3                 Abstention also is appropriate where state law is unclear and there is no strong federal  
 4 interest in the matter. *Atain Specialty Ins. Co. v. Slocum*, 2019 U.S. Dist. LEXIS 218433, at \*17-  
 5 18 (E.D. Cal. Dec. 18, 2019) (declining to recognize jurisdiction under the DJA where the case  
 6 would require unsettled issue of state law concerning insurance coverage); *Allstate Ins. Co. v.*  
 7 *Davis*, 430 F. Supp. 2d 1112, 1120 (D. Haw. 2006) (absent strong countervailing federal interest,  
 8 federal court “should not elbow its way … to render what may be an ‘uncertain’ and ‘ephemeral’  
 9 interpretation of state law”). Fairwinds contends that existing state law prohibits creation or  
 10 enforcement of sub-limits on coverage that are not “conspicuous, plain and clear” and that  
 11 Kinsale’s suit is without merit on this basis, among numerous others. But Fairwinds has not  
 12 located any California case authority squarely addressing whether an excess insurer can  
 13 effectively impose sub-limits on coverage for different categories of property by resort to a  
 14 vaguely worded “Statement of Values,” let alone where all discussion to obtain that policy was  
 15 in the context of “blanket coverage” limit. Kinsale’s aggressive overreach in this regard  
 16 potentially raises an unsettled issue of state law, and thus favors a dismissal here in favor of  
 17 resolution by California’s state courts.

18                   **c. This Federal Court has no strong interest in hearing this action  
 19 at this time.**

20                 There is no compelling reason for this Court to entertain this coverage action, least of all  
 21 at this time. Insurance coverage matters are properly left to the states under the McCarran-  
 22 Ferguson Act, 15 U.S.C. § 1012(a).<sup>4</sup> States “have a free hand in regulating the dealings between  
 23 insurers and their policyholders.” *Employers Reinsurance Corp. v. Karussos*, 65 F.3d 796, 799  
 24 (9th Cir. 1995) (overruled in part on other grounds by *Dizol*); *Dizol*, 133 F.3d at 1232 (because  
 25 insurance industry is “wholly state regulated,” federal interest is “minimal”). Where as here the

26  
 27                  4       15 U.S.C. § 1012(a) provides: “The business of insurance, and every person engaged therein,  
 28 shall be subject to the laws of the several states which relate to the regulation or taxation of such  
 business.”

1 sole basis of federal jurisdiction is diversity, the federal interest is “at its nadir.” *RobSac*, 947  
 2 F.2d at 1371. Federal courts should ““decline to assert jurisdiction in insurance coverage and  
 3 other declaratory relief actions presenting only issues of state law during the pendency of parallel  
 4 proceedings in state court’ unless there are ‘circumstances present to warrant an exception to that  
 5 rule.”” *American Nat'l Fire Ins. Co. v. Hungerford*, 53 F.3d 1012, 1019 (9th Cir. 1995)  
 6 (overruled in part on other grounds by *Dizol*). This action presents no such exceptional  
 7 circumstances, strongly supporting dismissal under *Brillhart*.

8           **2. A dismissal will discourage forum shopping.**

9           The second *Brillhart* factor favors “discouraging an insurer from forum shopping.”  
 10 *Travelers Indem.*, 2020 U.S. Dist. LEXIS 167738, at \*26-27 (quoting *Am. Cas. Co. of Reading,*  
 11 *Pa. v. Krieger*, 181 F.3d 1113, 1118 (9th Cir. 1999)). Federal courts have a duty to discourage  
 12 forum shopping and decline to entertain “reactive declaratory actions.” *Dizol*, 133 F.3d at 1225.

13           Reactive litigation can occur in response to a claim an insurance carrier believes  
 14 to be not subject to coverage even though the claimant has not yet filed his state  
 15 court action: the insurer may anticipate that its insured intends to file a non-  
 16 removable state court action, and rush to file a federal action before the insured  
 17 does so.... Permitting [a reactive lawsuit] to go forward when there is a pending  
 18 state court case presenting the identical issue would encourage forum shopping in  
 19 violation of the second *Brillhart* principle.

20           *RobSac*, 947 F.2d at 1372-1373.

21           In *Travelers Indem.*, Travelers filed suit in federal court after learning it could be facing  
 22 state court claims for breach of contract and bad faith from its insured, as well as additional  
 23 subrogation and contribution claims by another insurer. 2020 U.S. Dist. LEXIS 167738, at \*34  
 24 Facing a motion to dismiss under the DJA, Travelers argued it could not be found to have filed  
 25 “reactive litigation” because the state court action had not yet commenced. *Id.* The district court  
 26 rejected that argument, holding that the absence of a parallel action was not dispositive, and  
 27 concluded that Travelers’ federal court action was reactive. *Id.*

28           What occurred in *Travelers Indem.* is exactly what occurred here. Kinsale filed this  
 29 action shortly after it told Fairwinds it would deny coverage and Fairwinds shared its belief that  
 30 the issue was heading toward “inevitable litigation.” Kinsale engaged in a “race to the  
 31 courthouse,” hoping to deny its own insured the state court forum to which it is entitled, and in

which Fairwinds may conveniently join in a single proceeding all of its claims against its insurer as well as those against Broker who, according to Kinsale, failed to procure the coverage it was charged with obtaining. Such forum shopping by Kinsale should not be permitted.

### **3. A dismissal will avoid duplicative litigation.**

The final *Brillhart* factor seeks to avoid duplicative litigation. This Court would be endorsing duplicative litigation if it does not dismiss this declaratory relief action. The State Action will determine the exact same issues that are raised in this suit. Where the state and federal claims are “inherently intertwined” in this way, a dismissal is indicated.

If there are parallel state court proceedings involving the same issues and parties ... there is a presumption that the entire suit should be heard in state court. Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, not governed by federal law, between the same parties.

*Travelers Indem.*, 2020 U.S. Dist. LEXIS 167738, at \*42-43 (quoting *Dizol*, 133 F.3d at 1225 and *Brillhart*, 316 U.S. at 495). To proceed in this action and adjudicate the same facts and same issues as those in the State Action would subject Fairwinds to a risk of inconsistent outcomes (especially considering the separate claims involving Broker, *see* Section III.B.1, *infra*). Where duplicative litigation runs the risk of providing inconsistent factual findings and judgments, dismissing these proceedings under *Brillhart* is particularly appropriate. *See, e.g.*, *OneBeacon Ins. Co. v. Parker*, 2009 U.S. Dist. LEXIS 88043, at \*15 (E.D. Cal. Sep. 9, 2009).

### **B. The *Dizol* Factors Also Favor A Dismissal Of Proceedings.**

In addition to the *Brillhart* factors, all of which weigh in favor of dismissing this proceeding, the Ninth Circuit also looks to the *Dizol* factors. *Dizol*, 133 F.3d at 1225 n.5. Like the *Brillhart* factors, the *Dizol* factors also all weigh in favor of dismissal.

### **1. Proceeding here would not settle all aspects of the controversy.**

Even if this declaratory relief action were to proceed and be resolved, disputes would still remain between and among Fairwinds, its Broker, and Producers. In fact, any resolution of the issues raised in this action could only serve to complicate the State Action, because of the aforementioned risk to Fairwinds of inconsistent adjudications and collateral estoppel. This

1 factor favors dismissal.

2           **2. This declaratory action will not clarify the legal relations at issue.**

3           This declaratory action will not clarify all of the legal issues between Fairwinds, Kinsale,  
4 the Broker, and Producers. Even if this action went forward, Fairwinds' claims against the others  
5 not party to this proceeding would remain. This factor favors dismissal.

6           **3. This action was initiated for purposes of procedural fencing.**

7           As noted above, Kinsale initiated this action in a race to the courthouse, in an effort to  
8 forum shop and deny its insured a state court forum. This factor favors dismissal.

9           **4. Dismissal is necessary to avoid excessive entanglement.**

10          Dismissal is warranted to avoid excessive entanglement where a declaratory relief action  
11 raises factual issues pending in a state court action. A Court should not entertain an insurer's  
12 declaratory action where it might thereby "interject itself into the fact finding process already  
13 under way in state court.... Embarking on the same or substantially similar factual inquiries in  
14 federal court ... would be inappropriate." *National Chiropractic Mut. Ins. Co. v. Doe*, 23 F.  
15 Supp. 2d 1109, 1123-24 (D. Alaska 1998). For all of the reasons discussed, *supra*, adjudicating  
16 this declaratory relief action would result in undue entanglement between the federal and state  
17 courts and run the risk of inconsistent results. This additional factor weighs in favor of dismissal.

18           **5. Matters of convenience weigh in favor of dismissal.**

19          If this action were to proceed, any possible benefit would be outweighed by the burden  
20 on Fairwinds of simultaneously litigating the State Action and this declaratory relief action. Even  
21 where an action might otherwise clarify legal relations among the parties, the Court must be  
22 mindful of "the price of that clarification, which is calculated in terms of 'judicial administration,  
23 comity, and fairness to the litigants.'" *Bituminous Cas. Corp. v. Kerr Contractors, Inc.*, 2010  
24 U.S. Dist. LEXIS 62616, at \*18-19 (D. Or. Jun. 22, 2010) (citing *Chamberlain*, 931 F.2d at  
25 1367). *See also, TIG Ins. Co. v. Haseko Homes, Inc.*, 2011 U.S. Dist. LEXIS 8084, at \*\*53-54  
26 (D. Haw. Jan. 26, 2011) (any clarity rendered by federal court judgment outweighed by burden  
27 of requiring parties simultaneously to litigate in two courts; risks of inconsistent judgments,  
28 piecemeal litigation, and entanglement required abstention).

Moreover, Kinsale would suffer no detriment if this action is dismissed, as its rights and obligations under the Excess Policy can be adjudicated in the State Action. *See Hanover Ins. Co. v. Mason McDuffie Real Estate, Inc.*, 2016 U.S. Dist. LEXIS 173025, at \*10 (N.D. Cal. Dec. 14, 2016) (prejudice also depends on insurer prevailing in the coverage action; doubt should be resolved in favor of insured). This final factor favors dismissal.

#### IV. CONCLUSION

Fairwinds respectfully requests that the Court dismiss this action. The Declaratory Judgment Act vests this Court with strictly discretionary authority to hear actions such as this one, for a declaration regarding scope of insurance coverage. *Brillhart* and *Dizol* and their progeny provide the strongest possible support for a dismissal of these proceedings.

At minimum, this Court should stay this action pending resolution of the State Action.

Dated: September 9, 2021

SHARTSIS FRIESE LLP

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